No. 86-1181

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROY B. KEENER, *et al.*,
Petitioners,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

HOWARD DENNIS, *et al.*,
Petitioners,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Respondents.

STANLEY WILMES, *et al.*,
Petitioners,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF

WILLIAM F. MULRONEY*
PETER VANGSNES
ASHCRAFT & GEREL
2000 L Street, N.W., Suite 700
(202) 783-6400
Washington, D.C. 20036
Counsel for Petitioners

*Counsel of Record

CASILLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 20036 • 223-1220

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B. *Higgins v. Hampshire Gardens Apartments, et al.,* BRB No. 83-401 (January 14, 1987) 5a

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SUPPLEMENTAL BRIEF

Petitioners file this Supplemental Brief in order to call the attention of the Court to two decisiosn issued subsequent to the preparation of the Petition for a Writ of Certiorari in this case.

1. On January 23, 1987, the United States Court of Appeals for the District of Columbia Circuit issued an opinion on Appellant's Petition for Rehearing (App. A) in *Hall v. C&P Telephone Company,* 793 F.2d 1354 (D.C. Cir. 1986) (See Pet. for Cert. at 10, 21).

In *Hall,* the Court was faced with the argument that it should not defer to a decision of the D.C. Court of Appeals interpreting a provision of the LHWCA in a 1928 Act case. Appellant argued that the issue must be a federal one, because if it were local, the Supreme Court in *Johnson* would have deferred to the D.C. Court of Appeals' decision in *DiNicola v. George Hyman Construction Company,* 407 A.2d 670 (D.C. 1979).

The Court of Appeals rejected appellant's argument, holding that the Supreme Court had not addressed the question of whether the *Johnson* case presented a local issue. The Court strongly implied that, in its opinion, the Supreme Court would, if asked to address the issue, treat the issue as one of local law and would defer to any applicable D.C. Court of Appeals precedent (App. A at 2a-3a).

The Court of Appeals' decision on the Petition for Rehearing in *Hall,* like the *Hall* decision itself, strongly supports the argument presented on pages 22-24 of the petition. If the interpretation of the LHWCA in 1928 Act cases is a local issue, then this Court should have deferred to *DiNicola* in the *Johnson* case, and should correct its error in this case.

2. In *Higgins v. Hampshire Gardens Apartments, et al.*, BRB No. 83-401 (January 14, 1987) (App. B), the Benefits Review Board reluctantly followed the Court of Appeals' decision in this case, denying *en banc* consideration of an appeal because the right to *en banc* consideration was created by the 1984 LHWCA Amendments.[1]

The Board expressed its continuing disagreement and dissatisfaction with the Court of Appeals' decision, pointing to its decision as "exactly the sort of anomalous situations which the Board suggested would occur" (App. B at 6a-7a). The Board stated that "[t]he case before us today is, we fear, the first in a long series of cases arising under the 1982 District of Columbia Act in which our inability to follow Congressional intent that the 1984 Amendments to the Longshore Act be applied will lead to unforeseen consequences and unequal treatment for similarly situated claimants, employers and carriers." (footnotes omitted) (Appendix B at 7a-8a).

The Board's decision is important for a number of reasons. First, it demonstrates the anomalous results stemming from the Court of Appeals' decision in this case. Second, it shows that there is a split among the courts meriting the grant of the petition in this case. Third, and most importantly, it shows both the federal impact of the decision below and the broad effect of the decision beyond the tort cases directly involved in this case.[2]

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[1]The Board's decision was filed one day before the Petition for a Writ of Certiorari in this case, but was not available to counsel at the time the petition was filed.

[2]The Board stated that two hundred 1928 Act appeals are currently pending, and that more appeals are being filed every month. (App. B at 8a, n.5)

For the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari and Petitioner's Reply Brief, the petition should be granted.

Respectfully submitted,

William F. Mulroney
Peter J. Vangsnes
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Counsel for Petitioner

March 5, 1987

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5897

RONALD L. HALL AND LAURA HALL, APPELLANTS

v.

C & P TELEPHONE COMPANY

Appeal from the United States District Court
for the District of Columbia
Civil Action No. 84-01373)

On Appellants' Petition for Rehearing

Filed January 23, 1987

Mark J. Brice was on appellants' petition for rehearing.

Before: STARR, *Circuit Judge,* WRIGHT and MACKINNON, *Senior Circuit Judges.*

Opinion Per Curiam.

PER CURIAM: In our original opinion in this case, we held that the District of Columbia Workers' Compensation Act of 1928 was a "local" law, even though the statute merely applies the terms of a federal statute (the Long-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

shoremen's and Harbor Workers' Act of 1927), which is national in scope. 793 F.2d 1354 (1986). We concluded that we owed virtually the same deference to the D.C. Court of Appeals' construction of the 1928 D.C. Compensation Act as we would accord a decision of the highest court of a State interpreting state law.

Hall now seeks rehearing principally on the ground that our decision to defer to the D.C. Court of Appeals is inconsistent with the Supreme Court's decision in *WMATA v. Johnson,* 467 U.S. 925 (1984). Hall's Petition for Rehearing at 1. In *Johnson,* the Court interpreted the 1928 D.C. Compensation Act without considering what deference was owed to local D.C. court's construction of the Act. The Court merely noted that D.C. law "incorporates" the Longshoremen's Act, 467 U.S. at 928 n.4, and proceeded to analyze the latter Act. (Congress, we note, promptly overruled *Johnson* in the 1984 Amendments to the Longshoremen's Act.)

We remain convinced that our decision to defer to the holding of the D.C. Court of Appeals was correct. In our view, our approach is entirely faithful to the Supreme Court's *express* teachings on the issue of what deference federal courts owe "decisions of the District of Columbia Court of Appeals on matters of local law – both common law and statutory." *Pernell v. Southall Realty,* 416 U.S. 363, 368 (1974). Because *Johnson* did not even discuss the question whether the 1928 D.C. Compensation Act was "local" law, we are reluctant to construe it as binding authority on that precise issue. Our reluctance is enhanced by the fact that, prior to the Supreme Court's decision in *Johnson,* the D.C. Court of Appeals explicitly considered that very issue and held that the 1928 Act was a "local" law. *See District of Columbia v. Greater Washington Central Labor Council,* 442 A.2d 110, 116-17. (D.C.C.A.

1982), *cert. denied,* 460 U.S. 1016 (1983). That conclusion was an essential part of the reasoning underlying the D.C. Court of Appeals decision that the D.C. Council enjoyed authority to enact a new workmen's compensation scheme. *Id.* If the Supreme Court in *Johnson* had intended to rule that the D.C. Compensation Act of 1928 was national and not "local," thereby calling into question the lawfulness of the new workmen's compensation scheme enacted by the D.C. Council in 1980, we doubt very much that the Court would have done so without even addressing the applicable D.C. Court of Appeals precedent.

In any event, even if we were to accord no deference to the D.C. Court of Appeal's interpretation of the 1928 D.C. Compensation Act's exclusivity provisions as set forth in *Garrett v. Washington Air Compressor Co.,* 466 A.2d 462 (D.C.C.A. 1983), we would nonetheless find the reasoning of that case persuasive. As the court observed in *Garrett,* the Longshoremen's Act, as made applicable by the 1928 D.C. Act, provides a *comprehensive* scheme for compensating employees who are injured or killed in the course of employment. 466 A.2d at 463; *see also Johnson,* 467 U.S. at 931-32. In return to the guarantee of a practical and expeditious statutory remedy employees relinquish thier common-law tort remedies against employers for work-related injuries. *Garrett,* 466 A.2d at 463; *see Johnson,* 467 U.S. at 931.

Unsatisfied with the statutory *quid pro quo,* Hall contends that employees should be permitted to bring tort claims when the employer refuses to make timely compensation payments with an intent to injure. We could recognize such a cause of action, however, only by undoing the "legislated compromise between the interests of employees and the concerns of employers." *Johnson,* 462 U.S. at 931. Not only does the Act provide general im-

munity to employers from employee tort suits, 33 U.S.C. § 905(a) (1982), but it also provides a specific remedy for an employer's late payment of claims. *Id.* § 914(e), (f).

In our view, the *Garrett* court was clearly correct in concluding that the sort of tort claims advanced here fall within the Act's exclusivity provisions. *See also Texas Employers Insurance Association v. Jackson,* 618 F. Supp. 1316, 1319-22 (E.D. Tex. 1985). *But see Martin v. Travelers Insurance Co.,* 497 F.2d 329 (1st Cir. 1974).

Denied.

U.S. Department of Labor
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 83-401

CHARLES D. HIGGINS (Deceased) Claimant v. HAMPSHIRE GARDENS APARTMENTS and HARTFORD ACCIDENT AND INDEMNITY COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	PUBLISHED FILED AS PART OF THE RECORD JAN 14 1987 /s/ Linda M. Meekins, DV Clerk of the Board **ORDER DENYING MOTION FOR RECONSIDERATION AND SUGGESTION FOR RECONSIDERATION *EN BANC***

The Director of Workers' Compensation Programs, has moved for reconsideration and requests that the Board reconsider *en banc* our Decision and Order in this case. *Higgins v. Hampshire Gardens Apartments,* 19 BRBS 77 (1986) (Brown, dissenting). Employer responds that the Board has no jurisdiction to hear either of the Director's Motions[1]. For

[1] In light of our disposition, the Director's contentions and employer's response regarding the merits of the case are moot. We also note that claimant's widow expressed her support of the

the reasons stated below, we must agree with employer's position and deny the Director's motions.

The Board's Decision and Order in *Higgins* was issued on August 29, 1986, and the Director did not file his Motion for Reconsideration until September 29, 1986. A timely Motion for Reconsideration to the original panel must be filed not later than ten days after the Board's Decision and Order is issued. 20 C.F.R. § 802.407. Accordingly, this panel must deny the Director's Motion for Reconsideration as untimely.

Section 21(b)(5) of the Longshore and Harbor Workers' Compensation Act, added by the 1984 Amendments to the Act, provides that any party aggrieved by a decision of a panel of the Board may, within *thirty* days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. 33 U.S.C. §921(b)(5)[2]. Because the request for reconsideration *en banc* was filed within thirty days, the five permanent members, sitting *en banc*, would ordinarily proceed to consider whether the Director's request for reconsideration *en banc* should be granted. However, this case arises under the District of Columbia Workermen's Compensation Act, 36 D.C. Code §501 (1973) (enacted 1928). As employer argues, the United States Court of Appeals for the District of Columbia Circuit has recently held that the 1984 Amendments to the Longshore

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Director's position as *amicus curiae*, although admitting that she has no monetary interest in the issue (whether employer is liable for 250 or 288 weeks of permanent total disability compensation before the Special Fund takes over under 33 U.S.C. §908(f)).

[2] Prior to the 1984 Amendments, the Board was composed of three members. 33 U.S.C. §921(b)(1) (1972 Act). The 1984 Amendments authorized five permanent members and up to four temporary members. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. 98-426, 98 Stat. 1639, Section 15 (Sept. 28, 1984).

Act do not apply to cases arising under the 1928 District of Columbia Act. *Keener v. Washington Metropolitan Area Transit Authority,* 800 F.2d 1173 (D.C. Cir. 1986)[3] We are therefore constrained to hold that reconsideration *en banc* cannot be granted in cases arising under the District of Columbia Act, as such reconsideration was only made possible by the enactment of Section 21(b)(5) pursuant to the 1984 Amendments. Moreover, the provision that reconsideration may be sought within 30 days, rather than 10 days, is similarly inapplicable, as it is also contained in Section 21(b)(5) and applies only to *en banc* review. Hence, we must deny the Director's request.

The Board has previously held that it is bound by *Keener. Kulick v. Continental Baking Corp.,* 19 BRBS 115 (1986). In *Kulick,* the Board noted that *Keener* involved only a third-party action, and not a claim for worker's compensation benefits, and thus the Court did not consider the effect of its holding on worker's compensation claims such as this decided pursuant to the 1928 District of Columbia Act. This case demonstrates exactly the sort of anomalous situations which the Board suggested would occur. The *en banc* request for review that we deny here is available in every Board decision in cases arising under the

[3] Congress enacted the District of Columbia Workmen's Compensation Act in 1928. This Act applied the provisions of the Longshore Act of 1927 and all subsequent amendments to injuries and deaths in cases of District of Columbia employment. Pub. L. No. 419, 45 Stat. 600, 36 D.C. Code §501. In 1979, pursuant to authority conferred by Congress, the District of Columbia government enacted the District of Columbia Workmen's Compensation Act, D.C. Law 3-77 (July 1, 1980), D.C. Code Sections 36-301 to 344 (1981); this Act took effect on July 26, 1982, and applies to injuries and death on or after this date. In *Keener,* the Court held that the 1982 Act served to repeal the 1928 Act and thus rendered inapplicable any Amendments to the Longshore Act after July 26, 1982.

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Longshore Act and its extensions, except for cases arising under the 1928 District of Columbia Act. The case before us today is, we fear, the first in a long series of cases arising under the 1928 District of Columbia Act in which our inability to follow Congressional intent that the 1984 Amendments to the Longshore Act be applied[4] will lead to unforseen consquences and unequal treatment for similarly-situated claimants, employers and carriers.[5]

Accordingly, the Director's Motion for Reconsideration and Suggestion for Reconsideration *en banc* are denied.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Frank J. Marcellino
FRANK J. MARCELLINO
Administrative Law Judge

Dated this 14th
day of January 1987

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[4] As noted by the Court in *Keener,* the Joint Conference Committee Report to the 1984 Amendments expressed the intent that the 1984 Amendments be applied to the District of Columbia Act. 800 F.2d at 1178. *See also Gardner v. Railco Multi Construction Co.,* 18 BRBS 264 (1986).

[5] We note in this regard that despite the new 1982 Act, which removed District of Columbia workers' compensation from the Board's jurisdiction for injuries occurring on or after its July 26, 1982, effective date, there are currently approximately 200 appeals filed under the old Act pending before the Board, and new appeals are currently being filed every month. These cases are all affected by the holding in *Keener* and the instant case.

SERVICE SHEET

BRB NO. 83-401: Charles D. Higgins v. Hampshire Garden Apartments and Hartford Accident and Indemnity Company
Case No. 81-DCWC-615) (OWCP No. 40-137531)

Copies were sent to the following:

John C. Duncan, III, Esq. — Certified
McChesney, Pyne and
Duncan, P.C.
1000 Connecticut Avenue, N.W.
Washington, DC 20036

Wayne M. Mansulla, Esq., — Certified
2000 L Street, N.W.
Washington, DC 20036

Marianne Demetral Smith, Esq. — Certified
U.S. Department of Labor
Office of the Solicitor
Suite N-2620, NDOL
Washington, DC 20210

Donald S. Shire, Esq.
Associate Solicitor
U.S. Department of Labor
Suite N-2620, NDOL
Washington, DC 202010

Ms. Janice V. Bryant
Deputy Commissioner
US DOL/ESA/OWCP
P.O. Box 19421
1129 20th Street, N.W.
Washington, DC 20036

Judge Rudolf Sobernheim
U.S. Department of Labor
Suite 700, Vanguard Building
1111 20th Street, N.W.
Washington, DC 20036

Mr. Lawrence W. Rogers
Director, Office of Workers'
Compensation Programs
U.S. Department of Labor
Suite S-3524, NDOL
Washington, DC 20210